APPELLATE COURT

OF THE

STATE OF CONNECTICUT

AC 42667

VILLAGE MORTGAGE COMPANY

V.

RONALD GARBUS and GEORGANNE

APPENDIX TO THE BRIEF OF THE PLAINTIFF/APPELLEE VILLAGE MORTGAGE COMPANY

Attorneys for Plaintiff/Appellee
Richard P. Weinstein, Esquire
rpw@weinsteinwisser.com
Sarah Black Lingenheld, Esquire
sbl@weinsteinwisser.com
Weinstein & Wisser, P.C.
29 South Main Street, Suite 207
West Hartford, CT 06107
Telephone No. (860) 561-2628
Fax No. (860) 521-6150
Juris No. 45674

To be argued by Richard P. Weinstein

January 3, 2020

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2014 WL 7647778

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Waterbury.

CITY OF WATERBURY
v.
CONNECTICUT ALLIANCE OF
CITY POLICE, Brass City Local et al.

No. UWYCV146024514S.
|
Dec. 10, 2014.

Attorneys and Law Firms

Corporation Counsel Waterbury, Waterbury, for City of Waterbury.

McEleney & McGrail LLC, Hartford, for Connecticut Alliance of City Police, Brass City Local et al.

BRAZZEL–MASSARO, J.

I

INTRODUCTION

***1** The plaintiff, City of Waterbury, filed this action by way of a Verified Complaint dated July 21, 2014. The complaint is in two counts. Count One is a claim for Declaratory Relief. Count Two is a claim for Injunctive Relief. The court has previously ruled on two separate motions to dismiss. The first motion involved the State Board of Mediation and Arbitration (SBMA). On September 22, 2014, the court granted SBMA's motion to dismiss based upon the doctrine of sovereign immunity. The SBMA is no longer a defendant for purposes of the plaintiff's claims. The remaining defendants are Connecticut Alliance of City Police Brass City Local (CACP) and Marshall Segar, the attorney for the CACP and the subject of the disqualification issue that is before the court in the form of a declaratory judgment and temporary injunction. The court conducted a hearing on September 4 and 22, 2014. At the conclusion of the hearing, the court allowed the parties to file post-hearing briefs by October 10, 2014. CACP filed its brief, raising for the first time a motion to dismiss the plaintiff's action. The court permitted the plaintiff to file a response to the motion by October 20, 2014. The plaintiff filed an objection. The court issued a decision denying the motion on October 30, 2014.

II

FACTUAL BACKGROUND AND DISCUSSION

The plaintiff has filed this action and presented testimony and evidence regarding the appointment of arbitrators for the interest arbitration with CACP, the union representing police officers in the City of Waterbury. CACP is the newly elected collective bargaining unit for the police officers. The parties were subject to a collective bargaining agreement which terminated in June 2012. At that time, the members of the union were attempting to de-certify AFSCME Local 15 and requested that the plaintiff delay discussions on a new contract until after the vote in December 2012. In December, the members voted to de-certify and the new collective bargaining unit, CACP, became the defendant. CACP and the plaintiff began negotiations on the contract in February 2013. CACP was represented by Attorney Busca and Attorney Segar in the first meeting and initial discussions. In November and December 2013, during the negotiations, the plaintiff was informed that Attorney Busca would no longer take part in the negotiations and the only legal representative for CACP would be Attorney Segar. In January and February, offers were made and discussions continued with Attorney Segar as CACP's counsel and negotiator. The parties were unable to successfully negotiate a successor agreement and, pursuant to C.G.S. § 7–473c, the matter was referred to interest arbitration.

In June 2014, the matter proceeded to arbitration. As a part of the arbitration, each party selected an arbitrator and a neutral arbitrator, Mr. Gerald Weiner, was selected from a list of the State Board of Arbitration and Mediation. The parties scheduled what they call a “bump and run” as an initial meeting on July 7, 2014. This was continued until July 9, 2014. At that time, the plaintiff voiced its objection to the appointment of Attorney Segar as the party arbitrator for the CACP. The plaintiff contended Attorney Segar had a conflict of interest in serving on the arbitration panel because he was privy to information outside of the scope of arbitration in that 1) he represented CACP and participated in prior negotiations relative to the subject collective bargaining agreement; 2) his representation of CACP in prior negotiations for this very

same contract permitted him to be part of "off the record" discussions that may impact his appointment as an arbitrator; 3) he is presently the counsel for CACP and continues to represent CACP in matters involving grievances and workers' compensation issues for which he is compensated; and 4) his representation is a violation of the Rules of Professional Conduct. The plaintiff sought disqualification and/or recusal of Attorney Segar by the panel. The chair refused to hear the request indicating that it was not a matter within his jurisdiction. [1]

***2** The plaintiff then commenced this action, naming as defendants CACP, the SBMA, and Attorney Segar. The plaintiff is seeking, *inter alia,* a declaratory judgment that the appointment of Marshall Segar as CACP's arbitrator is invalid and that he should be disqualified and an injunction prohibiting him from sitting on the panel for the contract arbitration.

The evidence before the court consists mainly of testimony of the parties and experts as to the application and process of the arbitration and the involvement of the defendant Marshall Segar.

III

LEGAL DISCUSSION

A

General Standards

The first count of the complaint seeks equitable relief in the nature of a declaratory judgment. C.G.S. § 52–29 provides: "(a) The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. (b) The judges of the Superior Court may make such orders and rules as they may deem necessary or advisable to carry into effect the provisions of this section." Practice Book § 17–54 provides that the Superior Court will "render declaratory judgments as to the ... nonexistence (1) of any right, power, privilege or immunity ... whether such right, power, privilege or immunity now exists or will arise in the future." Practice Book § 17–55 provides the conditions for seeking declaratory judgment; and trial courts are afforded wide discretion in rendering declaratory judgment. *Leoni v. Water Pollution Control Authority,* 21 Conn.App. 77, 83, 571 A.2d 153 (1990).

The parties are in the process of mandatory interest arbitration in accordance with the collective bargaining statutes. The operative legislation that addresses the contracts between municipalities and the collective bargaining units has a provision which requires that, in the event the parties cannot agree upon the terms or conditions of the contract, it will be subject to mandatory binding arbitration consisting of a three-person panel. C.G.S. § 7–473c. The testimony in the instant action, which is not disputed, is that the parties could not agree upon terms and thus the collective bargaining agreement was subject to arbitration. In accordance with § 7–473c, each party selected one person as the party arbitrator, and they in turn selected the third arbitrator, Mr. Gerald Weiner. All complied with the statutory provisions. Thereafter, as noted above, the plaintiff objected to the selection of Attorney Segar as CACP's arbitrator, but the neutral contended this was not a subject for the arbitrator to decide. This action was commenced to request disqualification of Attorney Segar.

The plaintiff argues that the court should enter a declaratory judgment that disqualifies Attorney Segar from sitting as the party arbitrator because he has a conflict of interest and because his appointment as a party arbitrator while acting as the attorney for CACP violates the Rules of Professional Conduct. The defendants originally contended that there was no basis for the court to hear this matter but, after denying the motion to dismiss, this court conducted a hearing with testimony and evidence as well as argument of recent law regarding a challenge to the independence of the party arbitrator.

***3** The second count of the complaint requests that the court grant a temporary injunction prohibiting the arbitration from going forward with Attorney Segar as the defendant's arbitrator. The defendants argue that the temporary injunction provision that applies to the present action is C.G.S. § 31–112 et seq. because the issue before the court is a labor dispute. In accordance with this section, the defendants contend that the plaintiff must satisfy a higher standard. The statutory findings for § 31–112 include that the action involves "unlawful acts" which have been threatened and will be committed by CACP unless it is restrained, that there is substantial injury, that greater injury would be inflicted upon the defendants by granting relief, and that there is no adequate remedy at law. The plaintiff contends that the applicable statutory relief is

pursuant to C.G.S. § 52–473(b). The plaintiff also argues that the statutory provision relied upon by the defendant does not apply to the instant facts because it is limited to a strike or picketing.

C.G.S. § 31–113 provides for jurisdiction to issue a restraining order for any case involving a "labor dispute" for certain acts including: "(a) [c]easing or refusing to perform any work or to remain in any relation of employment; (b) becoming or remaining a member of any labor organization or of any employer organization; (c) paying or giving to, or withholding from, any person participating or interested in such labor dispute any strike or unemployment benefits or insurance, or other moneys or things of value; (d) by all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any state; (e) giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking or patrolling or by any other lawful method; (f) assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute; (g) advising or notifying any person of an intention to do any of the acts hereinbefore specified; (h) agreeing with other persons to do or not to do any of the acts hereinbefore specified; and (i) advising or urging or otherwise causing or inducing by any lawful method the acts hereinbefore specified." The defendant contends that the present action is a "labor dispute" pursuant to the statute and, therefore, the plaintiff must meet this heightened standard.

A plain reading of C.G.S. § 31–112 et seq. and the limited case law that has addressed the statutory provision does not lead to the conclusion that the factual scenario of this case satisfies the jurisdictional criteria for § 31–112 et seq. In particular, the statute sets forth specific instances for jurisdiction. The first area of inquiry is whether the instant action is a labor dispute. While the situation before the SBMA is a dispute that arose as a result of contract negotiations which prevented an agreement as part of the collective bargaining, the dispute now before the court is questionably a procedural issue which is not the same as conditions of employment or benefits and compensation that would under most circumstances be the subject of disagreement. Additionally, there is no claim of a prohibited practice or unfair labor practices that may be the subject of an injunction.

***4** The plaintiff contends that this statutory provision applies only in a factual scenario that involves strikes or picketing situations not involving municipalities. This is not an accurate analysis of the authority or jurisdiction of the court to order injunctive relief pursuant to the statute. Although *Local 45, United Rubber, Cork, Linoleum and Plastic Workers of America v. Uniroyal, Inc.,* 27 Conn.Sup. 155, 156–57 (1967), involved an ongoing strike, the impetus of the action brought pursuant to § 31–113 was the failure to abide by an agreement between the parties to prevent nonbargaining unit employees from performing work that is normally performed by bargaining employees. In *Local 818 of Council 4 AFSCME, AFL–CIO v. Town of East Haven,* 42 Conn.Sup. 227, 230–32, 614 A.2d 1260 [5 Conn. L. Rptr. 400] (1992), the court considered the application for injunctive relief pursuant to the requirements of § 31–115. This action did not involve picketing or strikes but was an action based upon the discharge of employees by the newly elected Mayor which the plaintiff argued was an unfair labor practice. *Id.,* at 228–29. The court specifically analyzed the actions of the defendant to determine whether the unilateral change in "terms and conditions" of employment without negotiating with CACP violated § 7–470(a)(4) and was an "unlawful act" within the meaning of § 31–115. (Internal quotation mark omitted.) *Id.,* at 234. The court not only issued an injunction based upon § 31–115, but did so in an action not involving a strike or picketing. Nevertheless, the *Local 818* action is factually distinct from the present case in that it was based upon a challenge to the discharge from employment and the method used. As such, there was an ongoing labor dispute that was considered by the court. The action that is before this court is not a request for an injunction to prevent the discharge of employees or the control of a strike or picket line but instead involves the procedural aspect of appointing the arbitrator who will hear the labor dispute. A reading of § 31–113 does not lend to a finding that this action falls within any of the nine acts outlined in § 31–113 as labor disputes. This dispute goes to heart of the arbitration procedure and thus is not subject to § 31–113 et seq. requiring a higher standard. Therefore, the analysis as to the request for relief in the form of a temporary and now permanent injunction will be analyzed pursuant to the criteria of C.G.S. § 52–471.

B

Declaratory Judgment

A declaratory judgment is a special proceeding under General Statute § 52–29. Section § 52–29(a) provides as to a declaratory judgment: "The Superior Court in any action or

proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment." "The purpose of a declaratory judgment action ... is to secure an adjudication of rights where there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties." (Internal quotation marks omitted.) *Mannweiler v. LaFlamme,* 232 Conn. 27, 33, 653 A.2d 168 (1995).

***5** Practice Book § 17–55 provides: "A declaratory judgment action may be maintained if all of the following conditions are met: (1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations, (2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and (3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure." Practice Book § 17–54 provides that the Superior Court will "render declaratory judgments as to the existence or nonexistence (1) of any right, power, privilege or immunity or (2) of any fact upon which the existence or nonexistence of right, power, privilege or immunity does or may depend, whether such right, power, privilege or immunity now exists or will arise in the future." See also *Leoni v. Water Pollution Control Authority, supra,* 21 Conn.App. at 83 ("The trial court is afforded wide discretion to render a declaratory judgment ... A court should not entertain an action for a declaratory judgment when an ordinary action affords a remedy *as effective, convenient and complete* ... but unless that *clearly* appears, the matter rests within the discretion of the court." [Citations omitted; emphasis in original; internal quotation marks omitted.])

The plaintiff has filed this action for a declaratory judgment asking the court to enter an order that the selection of Marshall Segar as the party arbitrator for CACP creates a conflict of interest which requires his disqualification. As is evident from the parties' arguments, the issue of whether and when a court may determine that a party selected arbitrator should be disqualified is an area which has not been extensively defined, nor are there any clear rules as to the parameters of addressing this issue and ruling upon it. The plaintiff has a significant interest in having this matter heard and decided by the court, and the arguments of counsel support the actual bona fide and substantial question which this court now reviews. As the testimony in this action confirms, the party arbitrators have been selected as individuals who have some knowledge and understanding of the party's position in order to advocate on behalf of their party and provide information to support the party's position. They are not neutral.

The Appellate Court, in *Metropolitan District Commission v. Connecticut Resources Recovery Authority,* 130 Conn.App. 132, 22 A.3d 651 (2011), has provided guidance for trial courts in determining if the party arbitrator has a conflict of interest which disqualifies him or her. The parties to this action express divergent positions as to whether the court has any authority to disqualify a party appointed arbitrator and if so, what is the standard to apply for disqualification. The applicable arbitration statute does not speak to any challenge to the selection of a party arbitrator. The defendant's argument is that the court has no authority to grant the declaratory judgment because the application of the statute has been interpreted to permit the parties almost complete unfettered selection.

***6** The argument of the defendant adds another layer to the already contrived process of arbitration. The arbitration process is required under the statutes if a municipal employer and a municipal employee organization are not able to agree to terms for the collective bargaining agreement. In particular, C.G.S. § 7–473c provides for the appointment of arbitrators with no guidelines. It states, in pertinent part: "[T]he chief executive officer of the municipal employer and the executive head of the municipal employee organization each shall select one member of the arbitration panel. Within five days of their appointment, the two members of the arbitration panel shall select a third member, who shall be an impartial representative of the interests of the public in general and who shall be selected from the panel of neutral arbitrators appointed ..."

The parties, particularly the defendants, have argued vociferously that the arbitrator appointed by CACP and the arbitrator appointed by the plaintiff are not truly "disinterested" arbitrators as that term is normally perceived. Each of the parties and the witnesses presented admit that the accepted procedure for appointment of arbitrators permits the appointment of an arbitrator that "advocates" for their party. The testimony of Mr. Summa about his experiences indicates that he is the appointed arbitrator for CACP on many arbitrations and is expected to argue the position of CACP to the neutral arbitrator in order to bring about a successful

result for CACP members. The issue which now confronts the court in regard to these appointments is whether there is any restriction for the appointment of a party appointed arbitrator. If the court accepts the argument of the defendant, there would never be a challenge to the party appointed arbitrator. Taken to the logical conclusion, if the court accepts the position of the defendants, the City of Waterbury could appoint its city attorney who negotiated the contract and CACP's appointed counsel and a neutral to arbitrate, making the process a sham. It does not allow the process to examine the positions from a knowledgeable viewpoint but instead a completely committed viewpoint.

Arbitrators should be without suspicion of abuse to the system. There should be some objectivity to the process to obtain a fair and equitable solution. If the appointed arbitrator is more than an advocate, the party has stepped over the line and is more than merely not "impartial." The court in *Metropolitan District Commission v. Connecticut Resources Recovery Authority, supra,* 130 Conn.App. at 132, 22 A.3d 651 (2011), found that there are circumstances when the trial court must act to disqualify a party arbitrator. In its decision, the Appellate Court, while agreeing that the appointment is not in reality neutral, found that there must be some oversight or criteria. *Id.,* at 143–44. The court recognized there may be instances in which the party appointed arbitrator can be disqualified because of involvement, connections or other matters which would question his or her ability to act fairly, honestly and in good faith. *Id.* The *Metropolitan District Commission* court addressed the same argument made in this action and determined that party arbitrators are not neutral. The court stated: "When parties agree to arbitration before a tripartite arbitration panel, it is commonly understood that the party-appointed arbitrators are not and cannot be [neutral] at least in the sense that the third arbitrator or a judge is." (Internal quotation marks omitted.) *Id.,* at 143 (citing *Metropolitan Property & Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co.,* 780 F.Sup. 885, 891 (D.Conn.1991)). This means that when the parties appoint their individual arbitrators, "each party's arbitrator is not individually expected to be neutral." (Internal quotation marks omitted.) *Metropolitan Property & Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co., supra,* at 892. "The fact that party selected arbitrators are not expected to be 'neutral,' however, does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest and good-faith manner." *Id.* Each party appointed arbitrator "has a responsibility not only to the parties but also to the process itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved." (Internal quotation marks omitted.) *Id.,* at 893. [2]

***7** Any court oversight of the appointment process is to maintain the integrity of the arbitration process. It is this integrity that cries out for review by the court. Our courts have stated that an impartial tribunal is at the very core of our due process. *Jones v. Connecticut Medical Examining Board,* 129 Conn.App. 575, 586, 19 A.3d 1264 (2011), aff'd, 309 Conn. 727, 72 A.3d 1034 (2013). There must be some boundaries to the appointment of the party arbitrator even if they are considered an advocate. This overriding interest was enunciated in *Metropolitan District Commission, supra,* 130 Conn.App. at 144, which stated, "To conclude that an arbitrator, who cannot observe his or her ethical duties or who cannot participate in a fair, honest and good-faith manner, may nevertheless serve as an arbitrator would undermine society's confidence in the legitimacy of the arbitration process" (citing *Garrity v. McCaskey,* 223 Conn. 1, 10, 612 A.2d 742 (1992)). Thus, *Metropolitan District Commission* recognized that there are some circumstances that merit a review and possible disqualification. The Appellate Court in *Metropolitan District Commission, supra,* 130 Conn.App. at 145, remanded the action back to the trial court to determine through an evidentiary hearing whether the arbitrator "could not carry out his ethical duties by reason of his relationship to the plaintiff."

It is this same concern for the integrity of the process that must be thoroughly analyzed in this action. Therefore, the standard of review in determining the appropriateness of the appointment of the party appointed arbitrator is whether that arbitrator can participate in a fair, honest and good-faith manner. This standard must be broadly applied not simply to what the arbitrator or party considers but to the integrity of the process as it is displayed to the public. It is therefore not solely a determination of whether the parties believe they are acting fairly or in good faith but whether the facts demonstrate to the public that the arbitrator's participation is fair, honest and in good faith.

Metropolitan District Commission requires a fact-sensitive approach to the determination of whether the party appointed arbitrator should be disqualified. See *id.* Although the parties have referred to the factual scenarios of *Metropolitan District Commission* and compared it to this action, the factual basis of this action involves a more complicated and intricate factual background that sets it apart from Attorney Droney's

connection to the union in *Metropolitan District Commission.* In other words, *Metropolitan District Commission* allows this court to base its decision solely upon the testimony and evidence as to the involvement, impact and interest of Attorney Segar. It is not only Attorney Segar's attorney-client relationship with one of the parties to the arbitration but the impact of that relationship and the public perception of his involvement with CACP and the arbitration process that the court must examine to determine if he can act in good faith, honestly and fairly. This court, like the plaintiff, is not espousing any opinion as to the honesty of Attorney Segar. The court, however, must examine the facts of his representation with an unbiased approach to the impact upon the arbitration process. The court has a very grave concern about the public perception of the appointment of any interested party in the instant arbitration. [3]

***8** The arbitration system, established through statute and by operation, has permitted and accepted a degree of connection between the arbitrator and the party. It is acceptable that the arbitrator has some knowledge of the position of the party and is willing to advocate a position for the party. The tri-partite process was intended to allow the party's arbitrator to have the ability to educate and hopefully influence the neutral as to the party's position. The testimony and evidence in the instant action, however, provides a plethora of involvement for Attorney Segar with CACP absent his appointment as a party arbitrator.

The testimony concerning the involvement of Attorney Segar was quite extensive. Additionally, there was testimony by two experts concerning the allegation that his representation violates the Rules of Professional Conduct.

It is undisputed that Attorney Segar was hired as counsel for CACP. Originally, he worked with Attorney Busca. However, in the last months of the negotiation of the very collective bargaining agreement that is subject to this mandatory interest arbitration, Attorney Segar was the *sole* counsel for CACP. He not only advised CACP in various matters and for part of the time but also became their negotiator, legal counsel and attorney for grievances, workers' compensation claims and prohibited practice claims. During the course of the negotiations for this agreement he took part in "off the record" discussions that should not be conveyed or used during the arbitration proceedings. He not only had attorney-client discussions during the negotiations but presently has attorney-client obligations because, as Attorney Dubois stated, Attorney Segar continues in this capacity until there is a writing that he no longer represents the client. Thus, in effect, he is wearing two hats at the same time, that is, counsel for CACP and party arbitrator. This is evident from the testimony of Attorney Segar that he is active in his representation, stating he presently represents Union members in grievance and workers' compensation matters and is contemplating some new actions. Attorney Segar's active representation of CACP, including his active involvement in this very action, creates a relationship well beyond any factual scenarios ever considered by prior court actions.

This close alliance with CACP is different than the relationship of Attorney Droney and the union in *Metropolitan District Commission.* This close alliance has not only provided financial gain to Attorney Segar in the past, but for the ongoing arbitration and for future claims based upon the terms of the final arbitration award. In other words, the future financial remuneration for Attorney Segar and his legal representation may be impacted by the arbitration decision.

Although Attorney Segar testified that he can balance his duties as both an attorney and arbitrator, the expert for the City disagrees, and Mr. Dubois is uncertain as to the impact on his present legal representation. Ms. Kimberly Knox testified on behalf of the plaintiff and Mr. Mark Dubois on behalf of the defendant. These witnesses, not surprisingly, provided testimony with opposing positions as to the issue of whether Attorney Segar would be subject to or violate any rules of professional conduct if he was to serve as an arbitrator. The defendant focused some of its argument on the interpretation of the general practice of law as decided by the Supreme Court in the case of *Bysiewicz v. Dinardo,* 298 Conn. 748, 6 A.3d 726 (2010), to support its position that the service as an arbitrator is not the practice of law. What the defendants lose sight of in that argument is not whether the actual service as an arbitrator in the proceeding is impacted by the arbitrator's profession as a lawyer but it is whether the position as CACP's attorney will have a specific impact on Mr. Segar's ability to carry out his arbitration duties without interfering with the on-going attorney-client association with CACP. Ms. Knox testified that an attorney always wears the attorney's hat. This is significant in the challenge to Attorney Segar's appointment as the party arbitrator because he cannot eliminate his client responsibilities during the arbitration proceedings. Attorney Dubois was asked about the interrelationship and the method in which the attorney could prevent conflict with a client. Mr. Dubois testified that without a written intention to withdraw as counsel, the attorney is obligated to act as counsel in all matters. It is undisputed that Attorney Segar is presently

counsel for all of CACP's affairs. This dual responsibility provides at the very least a public perception of conflict and unfairness. The result of the dual responsibility is that Attorney Segar cannot be fair and act in good faith when it may have an impact on his client's needs for his services. Any decision by the arbitration panel will be seen by the public as a done deal with no opportunity for a fair, balanced approach that considers the taxpayers who will fund any arbitration finding.

***9** The parties cannot wait until they are in the middle of the arbitration to suddenly discover a specific conflict which requires recusal. Segar argues that, to date, the rules have not been violated and that he has the right to refuse recusal based upon his own good faith belief. The decision for the court is not based upon Attorney Segar's belief but instead based upon the factual circumstances and the public perception and integrity discussed in *Metropolitan District Commission* and *Metropolitan Property, supra,* 130 Conn.App. at 144, and *Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co., supra,* at 780 F.Sup. 893. The constant looming question will be whether Attorney Segar's actions and the decision of the panel are made under the hat of the attorney or the hat of an arbitrator. Based upon the particular facts in this action, Attorney Dubois conceded that the continuing representation may be a problem.

The Rules of Professional Conduct, which were discussed by the experts, including the Preamble to the Rules, establish a lawyer's responsibilities. The preamble in and of itself is not a rule but certainly provides a framework for the behavior and conduct expected of counsel. Like the preamble, the court also views the rules cited by the parties to determine if the defendant has violated the Rules. While the evidence of the experts is divided at this time, the court is persuaded by the fact that the defendant, Segar, claims they need clarification. The court also finds persuasive the application of Rule 1.12(d), which states: "An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party." This rule leads to the finding that representation is restricted. This analysis is consistent with the testimony of Mr. Dubois who agreed that the presence of an ongoing attorney-client relationship can create a problem with other representation when the attorney has failed to withdraw an appearance. Although the testimony of the experts was divided on each of the rules enunciated by the plaintiff, this court cannot ignore the testimony of Mr. Dubois that when there is an ongoing attorney-client relationship there is a problem. The overall impact of this exclusionary rule weighs heavily against the attorney serving actively in both positions at the same time.

With the abundance of evidence and testimony about the strong connection and advocacy by Attorney Segar for CACP, his ongoing employment with CACP, his remuneration for work as counsel, as well as the Application of the Rules of Professional Conduct, there is strong support for the finding that Attorney Segar cannot act in a fair manner which will satisfy both of his masters. He cannot continue as counsel and at the same time hide under the cloak of an arbitrator. Attorney Segar's inside knowledge and the client confidences he holds may be a part of the ultimate arbitration discussions, during which Attorney Segar cannot wipe the slate clean. In fact, during the course of his testimony, Mr. Dubois conceded that Mr. Segar is the attorney for CACP because he has not made known his intent to cease the representation. Although Mr. Dubois rationalized that the appointment as arbitrator is not the same as a legal representative, he could not completely eliminate Attorney Segar's obligation as an attorney to his client, CACP, a representation which Attorney Segar has not taken the steps to withdraw.

***10** As was stated during the course of the expert testimony, the Rules of Professional Conduct are rules of reason. The discussions with his client CACP take on a different obligation with attorney-client privileges and the possibility that this will be conflicted if asked to testify or relay relevant but undisclosed information for the arbitration. It is difficult if not impossible to differentiate the representation of Attorney Segar as the only attorney for the defendants in the negotiations and now the party arbitrator in the mandatory arbitration. The court cannot change what will be a great degree of distrust and disagreement from taxpayers and citizens no matter what the final result is after the arbitration when the public learns of the involvement of the arbitrators in the final decision. It is this aspect of the decision that provides the court with an overwhelming basis to disqualify the one individual who was in support of what may benefit him. It is the overriding public perception because of the unique involvement of Attorney Segar that produces a factual scenario unique to this action that makes this action one for disqualification. The position of Attorney Segar as the sole counsel and negotiator with ongoing and future legal representation of CACP creates a conflict which is further exacerbated by the public perception of unfairness or lack of good faith that will inevitably surface as the taxpayers are impacted by any decision.

Therefore, the court finds that the plaintiff has satisfied the burden for a declaratory judgment and an order shall enter that Attorney Segar is disqualified from sitting as the party arbitrator for CACP in this interest arbitration.

C

Injunctive Relief

The Second Count of the Complaint requests that the court enter an order for temporary injunctive relief. Prior to the hearing on this matter, the parties discussed but did not arrive at a resolution as to whether the claim for temporary injunctive relief would be permanent by agreement of the parties. The plaintiff indicated its assent and as part of the memorandum submitted by the defendants after the hearing they finally agreed to allow the court to determine whether a permanent injunction would be entered. Based upon this representation, the court reviews the Second Count as a claim for a permanent injunction.

"A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of adequate remedy at law." (Internal quotation marks omitted.) *Walton v. Hartford,* 223 Conn. 155, 165, 612 A.2d 1153 (1992). "A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) *Id* .

As stated above, the plaintiff was involved in the negotiation of the renewal of a collective bargaining agreement with CACP, the union that represents the Waterbury Police. Because the parties were unable to successfully agree to the successor agreement, they were mandated by statute to proceed with arbitration by a tripartite panel. The selection process is the basis of this action.

***11** The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm and the lack of adequate remedy at law. *Kelo v. New London,* 268 Conn. 1, 89, 843 A.2d 500 (2004), aff'd, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005); *Schlichting v. Cotter,* 109 Conn.App. 361, 370, 952 A .2d 73, cert. denied, 289 Conn. 944, 959 A.2d 1009 (2008). Moreover, "[t]he extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm." *Karls v. Alexandra Realty Corp.,* 179 Conn. 390, 402, 426 A.2d 784 (1980). Whether the plaintiff is entitled to relief is determined, not by the situation existing at the time of the alleged violations, but by that which has developed at the time of trial. *E.M. Loew's Enterprises, Inc. v. International Alliance of Theatrical Stage Employees,* 127 Conn. 415, 419, 17 A.2d 525 (1941); *Edson v. Griffin Hospital,* 21 Conn.Sup. 55, 63–64, 144 A .2d 341 (1958). [4] The likelihood of success is no longer a criteria because the parties have agreed to a permanent injunction.

1

Irreparable Harm

The "irreparability" of an injury depends more upon the nature of the right injuriously affected than the pecuniary measure of the loss. *New London v. Perkins,* 87 Conn. 229, 235, 87 A.2d 724 (1913). The plaintiff contends that selecting the very person who served as legal counsel for negotiation, took part in the in depth "off the record discussions," and who is presently providing legal representation for CACP for new conflicts related to employment issues has an insurmountable impact and creates an impression that would taint any decision of the panel. Likewise, the plaintiff has a very important public purpose in negotiating and resolving employment issues related to the employment of the officers that keep the citizens safe while safeguarding from uncontrollable collective bargaining terms. Lastly, the citizens and taxpayers of the City of Waterbury expect that the parties will enter into arbitration that will fairly resolve their differences without adversely impacting citizen safety or the city's finances and without creating a policy dilemma. All of these concerns must be fairly addressed in the arbitration and the award made as a result of the hearing before the arbitrators. As noted above, the facts as they exist with the appointment of Attorney Segar will lead to multiple negative impacts that will result in a negative perception of the arbitration, which was implemented by statute in part to prevent an impasse but also to permit a presentation aimed at a fair and balanced decision. CACP members are interested in resolving the differences and entering into a workable collective bargaining agreement with the plaintiff that will allow them appropriate benefits and protections. The plaintiff

has a concern that the resolution of the bargaining agreement will provide proper security and protection to the citizens while at the same time not resulting in unmanageable costs or benefits. The citizens who are the ultimate beneficiaries of the agreement as well as the financially responsible parties for the terms are entitled to a fair, balanced and affordable bargaining agreement which provides the needed services. All of the varied concerns depend upon the proper presentation and consideration by the arbitrators. The arbitration is the key to resolution of the differences. Thus, it is essential that all interested parties have at least what appears to be a panel that can act in a fair and honest manner.

***12** The applicable arbitration statute does not speak to a challenge to the selected party arbitrators before the hearing and decision. The defendant argues that the injunction is not necessary because the plaintiff has an avenue to challenge the arbitrator on appeal after the completion of the hearings. This avenue is precisely the type of irreparable harm that the court must prevent. To permit the parties to engage in what would be a "sham" arbitration because of the knowledge of the proposed challenges and to expend time not only of the arbitrators, the parties but also witnesses and the expense to everyone including taxpayers of the City and the State is significant. What is more significant is permitting the selection of an arbitrator who not only knows one party's position but who also actually advocated for and was intimately involved with every detail and nuance of that party's positions, which would negatively impact the public perception of and cause significant irreparable harm to the arbitration process.

What is at stake in this action is allowing an individual to serve as an arbitrator who has intimate knowledge of the position of the defendant and plaintiff that was gained as a result of in-depth involvement in the actual negotiations which led up to the arbitration provisions. To permit such an unrestricted selection sets a precedent well beyond simply the selection of an interested person. Rather, it would allow the selection of an arbitrator who has been described as having "skin in the game." If the facts in this action are not sufficient to challenge the choice of arbitrator, the court can see no situation which would ever disqualify an arbitrator in interest arbitration, which is a valid area of judicial review in accordance with *Metropolitan District Commission v. Connecticut Resource Recovery Authority, supra,* 130 Conn.App. at 144. Therefore, appointment of the very counsel who has been the legal representative and not simply a body at the table is impossible to justify to any member of the public looking for even a semblance of a fair and honest result to a contested issue. The argument that such a challenge can be argued by an appeal of the arbitration decision does not negate the public perception of a system which does not have a fair and balanced procedure. Additionally, the appeal of an arbitration decision involves a stricter standard which would inevitably leave the plaintiff almost incapable of challenging the appointment. This court must preserve and protect the integrity of the arbitration process, as well as maintain the confidence of the public in that process. The public has a right to expect that the process, which may ultimately result in expenses for the taxpayers, is fair and open. An attorney who represented CACP in pre-arbitration negotiations, who presently has two contracts in which he represents CACP, and who is more than a mere body at the negotiation table but is an integral part of open negotiations as well as intimate "off the record" responses is the epitome of a person who is involved and benefitting from the ultimate arbitration results.

***13** The integrity of the very process that was developed to bring the parties together for a resolution is at stake by permitting the appointment of party selected arbitrators without some boundaries. Attorney Segar's acting as a party selected arbitrator in this case could destroy the public trust in the process and no appeal or other action would rectify the harm. The plaintiff has demonstrated the irreparable harm in this factual scenario.

2

Adequate Remedy at Law

The defendant contends that there is a remedy at law by virtue of the Application to Vacate Award. However, the defendant indicates that that the grounds for vacating the award involve findings of corruption or fraud. [5] In support of the availability of a challenge to the decision of the arbitration panel, they rely upon the decision in *AFSCME, Council 4, Local 681 v. West Haven,* 43 Conn.Sup. 470, 662 A.2d 160 (1994), aff'd, 234 Conn. 217, 661 A.2d 587 (1995). The *AFSCME* case was a constitutional challenge to the change in panel that would oversee disputes between the city and union. *Id.,* at 472–73. In particular, that action involved the substitution of a specially appointed financial review board to oversee the city and replace the binding arbitration panel. The facts and circumstances surrounding the present action are distinct from the facts in *AFSCME.* The adequate remedy

at law would involve not only an appeal but the full hearing, discussion and findings by the arbitration panel before any challenge. This remedy would expend a great deal of time and finances before the plaintiff would have the opportunity to address the appointment. Not only would there be additional delay, but the public perception could not be addressed by such an appeal. Based upon the court's findings, as noted above, there is no adequate remedy to address these issues.

D

Defenses

The defendant has alleged that the injunctive relief and declaratory judgment action should be precluded because of several defenses including laches, waiver, and estoppel.

"The defense of laches, if proven, bars a plaintiff from seeking equitable relief ... First, there must have been a delay that was inexcusable, and second, that delay must have prejudiced the defendant." (Internal quotation marks omitted.) *Florian v. Lenge,* 91 Conn.App. 268, 281, 880 A.2d 985 (2005). "The burden is upon the party alleging laches to establish that defense." *Cummings v. Tripp,* 204 Conn. 67, 88, 527 A.2d 230 (1987). "The mere lapse of time does not constitute laches ... unless it results in prejudice to the [opposing party] ... as where, for example, the [opposing party] is led to change his position with respect to the matter in question." (Internal quotation marks omitted.) *Fromm v. Fromm,* 108 Conn.App. 376, 385–86, 948 A.2d 328 (2008). The time period in which the plaintiff did not voice concern and objection to the selection of Attorney Segar was minimal. The plaintiff provided testimony about on-going disruptions which caused them to fail to bring it to the defendant's attention for a few months. This was not such a delay that would support the defendants' argument that it constitutes laches. The defendants do not provide any evidence that this short period of time caused any prejudice to them. In fact, the testimony of Attorney Segar is that he is still uncertain even as to the amount of payment. The defendant has also waited a substantial period of time before joining or asserting issues related to the motions to dismiss. There is not sufficient evidence or testimony to support a finding of laches.

***14** "Waiver is the intentional relinquishment of a known right." *Heyman Assoc. No. 1 v. Ins. Co. of Pennsylvania,* 231 Conn. 756, 777, 653 A.2d 122 (1995). "To constitute waiver, there must be both knowledge of the existence of the right and intention to relinquish it." (Internal quotation marks omitted.) *Novella v. Hartford Accident & Indemnity Co.,* 163 Conn. 552, 562, 316 A.2d 394 (1972). Waiver may be express or implied from conduct. See *Roy v. Metropolitan Property & Casualty Ins. Co.,* 98 Conn.App. 528, 532, 909 A.2d 980 (2006). Our Supreme Court, "while recognizing the analytic distinction between express waiver and estoppel, has held that implied waivers and estoppels by conduct are so similar that they are nearly indistinguishable." (Internal quotation marks omitted.) *Hanover Ins. Co. v. Fireman's Fund Ins. Co.,* 217 Conn. 340, 351–52, 586 A.2d 567 (1991). Estoppel is an equitable doctrine that precludes a party from asserting a right it might otherwise have enforced. *Boyce v. Allstate Ins. Co.,* 236 Conn. 375, 383–84, 673 A.2d 77 (1996). "Our jurisprudence regarding the doctrine of equitable estoppel is well established ...

"Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby [the party] is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed ... as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse ...

"We [have] recognized that estoppel always requires proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury." (Citations omitted; internal quotation marks omitted.) *Union Carbide Corp. v. Danbury,* 257 Conn. 865, 872–73, 778 A.2d 204 (2001).

The defendant points to the initial correspondence that began the arbitration process as the basis for its defenses of waiver and estoppel. (Plaintiff Exhibit 1 and Defendant Exhibit A.) The letter in and of itself has not been proven to be a knowing waiver of the right to challenge and ask for disqualification. The parties have disagreed as to the forum to challenge the party arbitrator. The testimony indicates that the issue was first raised with the neutral who was appointed after the party arbitrators and, thus, that there is no set procedure to challenge the party arbitrator selection. The neutral would not address the challenge and left it to the court. The very issue of a challenge is a unique issue which does not require objections prior to the first meeting. The testimony indicates the issue was raised at the very first meeting, called the "bump and run," during which the parties were discussing the logistics of

the arbitration. The testimony of the city attorney was clear that the limited time to discuss the appointment with the city officials and to object at the very first meeting was not a relinquishment of the right to challenge. The first meeting was described as basically an informal start of the process to discuss issues and dates. No work was done to further the arbitration until the first meeting. There was no testimony or evidence that the defendant in any way changed its position or was induced in any way to change its position as a result of the challenge to the appointment and possibly disqualification of Attorney Segar. Additionally, Attorney Segar testified that he had not made any arrangements for payment at the time of the "bump and run." In fact, the testimony of Attorney Segar was that he still does not know who is paying him or what his fee will be as an arbitrator. Therefore, the defendant has failed to demonstrate a defense of waiver or estoppel.

***15** Lastly, the defendant contends that, if the court grants the disqualification of Attorney Segar, it will encourage parties to file injunctive relief seeking disqualification of the other arbitrators. Nothing could be further from the reality of this decision. This court has made it clear that the decision in this action is fact sensitive. The court has engaged in a thorough review of the facts surrounding the appointment of Marshall Segar to determine if the facts support a disqualification. If the court accepts the defendant's argument and refuses to follow the Appellate Court's decision in *Metropolitan District Commission,* the entire arbitration system would be a mockery, allowing the appointment of individuals with clear conflicts that prevent them from participating in the arbitration process in a fair, honest and good-faith manner. The public perception of allowing an attorney with such a conflict to serve as a party arbitrator would be destructive to the arbitration process, which needs some semblance of an unbiased hearing and decision. Therefore, this argument is rejected.

IV

CONCLUSION

Based upon the above, the court issues a declaratory judgment in favor of the plaintiff, City of Waterbury, that the defendant Marshall Segar is disqualified from serving as the appointed party arbitrator for the defendant Connecticut Alliance of City Police Brass City Local for the interest arbitration Case No.2013 MBA–370, City of Waterbury and Brass City Local, CACP. The court enters a permanent injunction enjoining Connecticut Alliance of City Police Brass City Local from proceeding with the interest arbitration between the plaintiff and Connecticut Alliance of City Police Brass City Local until Connecticut Alliance of City Police Brass City Local selects a new panel arbitrator to replace Marshall Segar.

All Citations

Not Reported in A.3d, 2014 WL 7647778, 59 Conn. L. Rptr. 477

Footnotes

1 As part of the legal action before this court there have been challenges to the court's jurisdiction which have been addressed in two separate memorandums of decision on motions to dismiss filed by the defendants. The first motion to dismiss was filed by the SBMA after day one of the hearing on the injunction and a decision was entered which granted the motion [59 Conn. L. Rptr. 31]. It is no longer a party to the action.

2 The court does not address the reality that in a collective bargaining unit involving a municipality, there is no choice about the submission to a tripartite panel because it is mandatory. Here the parties have not voluntarily entered into the mandatory interest arbitration but do so because it is required by law.

3 Attorney Segar testified that he can act in good faith, honestly and fairly as a party arbitrator. The court does not utilize this self-serving testimony and looks instead to the actual circumstances in which he has represented, is representing and will continue to represent and be compensated by CACP in determining the impact of his appointment.

4 The defendant Segar noted in his post-hearing memorandum that the issue is about unrestricted selection of partisan arbitrators and the need to clarify the issues about the preservation of this right. This statement confirms the need to determine the issue which the defendant has defined as an unrestricted selection. (Brief at page 10.)

5 General Statutes § 52–418(a) provides: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct

in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

2016 WL 3179757
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

TOWN OF GLASTONBURY
v.
METROPOLITAN DISTRICT COMMISSION.

No. HHDCV146049007S.
|
May 12, 2016.

Synopsis

Background: Town brought action against quasi-municipal corporation responsible for providing town's drinking water, seeking a declaratory judgment to establish that a surcharge imposed by corporation on town and other non-member towns for water usage was illegal. Parties moved for summary judgment.

Holdings: The Superior Court, Judicial District of Hartford, Peck, J., held that:

[1] legislation authorizing corporation to impose surcharges on drinking water provided to non-member towns was not a clarifying amendment that could be applied retroactively;

[2] town's action was justiciable; and

[3] prior to legislation authorizing specifically authorizing such surcharges, corporation lacked statutory authority to impose general surcharge on non-member towns to recapture district-wide costs previously incurred for capital improvements to water infrastructure.

Town's summary judgment motion granted.

West Headnotes (4)

[1] Water Law
Constitutional and Statutory Provisions
Water Law
Compensation or Charges

Legislation authorizing quasi-municipal corporation to impose surcharges on drinking water provided to non-member towns was not a clarifying amendment that could be applied retroactively to establish that corporation was acting within its statutory authority in imposing such surcharges prior to legislation's enactment; nothing in amendment or its legislative history evidenced a clear intent that surcharge component be applied retroactively.

1 Cases that cite this headnote

[2] Declaratory Judgment
Counties and Municipalities and Their Officers

Action by town against quasi-municipal corporation responsible for providing town's drinking water, seeking declaratory judgment to establish that surcharges imposed by corporation were unlawful, was justiciable, even though town was not presently seeking damages; if surcharges were unlawful, then town could demonstrate damages for those year in which surcharges were imposed.

[3] Water Law
Compensation or Charges

Prior to enactment of legislation specifically authorizing quasi-municipal corporation formed to provide drinking water to neighboring towns to impose surcharges on water provided to non-member towns, corporation lacked statutory authority to impose general surcharge to recapture district-wide costs previously incurred for capital improvements to water infrastructure; under governing legislation, corporation was authorized to impose fees only for supplying water, constructing pipe connection between district and municipality, and for laying water mains or replacing water service pipes with respect to those customers whose property was directly benefited.

1 Cases that cite this headnote

[4] Declaratory Judgment
Limitations and Laches

It was not unreasonable for town to have delayed challenging surcharge imposed by quasi-municipal corporation responsible for providing town's drinking water, even though surcharge had been in place for several years and, thus, laches did not provide defense to town's declaratory judgment action against corporation, in which town sought to establish that surcharges were unlawful; for most of time that surcharge was in place, it was a small amount, but after remaining relatively stable for many years, it increased by nearly 300 percent and nearly 800 percent a year later, which prompted town to complain about surcharge and investigate its origins, after which town initiated action.

Attorneys and Law Firms

Murtha Cullina LLP, Hartford, for Town of Glastonbury.

Halloran & Halloran LLC, Hinckley Allen & Snyder LLP, Hartford, for Metropolitan District Commission.

Opinion

PECK, J.

***1** This case concerns an action brought pursuant to General Statutes § 52–29 by the plaintiff, the town of Glastonbury, against the Metropolitan District Commission (MDC), on February 21, 2014. The plaintiff seeks a declaratory judgment to establish that a surcharge imposed by the MDC on the plaintiff and other non-member towns for water usage prior to October 1, 2014, was illegal. The complaint sets forth the following allegations. The plaintiff is a municipal corporation organized and existing under the laws of the state of Connecticut. The defendant is a quasi municipal corporation, established in 1929 by the Connecticut General Assembly designated as Special Act No. 511. The defendant provides drinking water, water pollution control, mapping and household hazardous waste collection to eight member towns. [1] In addition, the defendant provides drinking water to residents and businesses in portions of Farmington, Glastonbury, East Granby, and South Windsor. These towns are referred to as "non-member" towns. Customers in the non-members towns receive only drinking water from the defendant. Approximately 9,000 customers are located in the non-member town areas. The plaintiff is a customer of the defendant. The plaintiff receives and pays for drinking water at various town facilities and properties.

The powers, duties, and obligations of the defendant are compiled in a Charter of the Metropolitan District (the "Charter"). When authorizing the defendant to provide water to non-member towns in 1931, the General Assembly expressly mandated that the defendant must charge customers in non-member towns "rates uniform to those charged within said district." The only additional charge the General Assembly authorized during this change was that the cost of pipe construction between the district and the non-member town would be paid by the nonmember town. The plaintiff asserts that the defendant currently imposes a "non-member surcharge" on recipients of water in non-member towns, including the plaintiff. In 2011, the defendant added a non-member surcharge of $52.68 to the annual bill of all water recipients in non-member towns, irrespective of how much water, if any, was used. The surcharge was subsequently increased in 2013 to $423.00. In 2014, the amount was reduced to $198.00 after complaints from various non-member towns. According to the defendant, it intended to offset the 2014 surcharge reduction by extending the time period during which it would be paid to 25 years. The plaintiff further asserts that although the defendant's representatives have stated that the addition of the foregoing surcharges reflect costs associated with capital improvements necessary to provide or maintain water service to each particular non-member town, other information from the MDC has indicated that the surcharges in fact were an attempt to recapture district wide costs long ago incurred for capital improvements to MDC water infrastructure, beyond those relating to providing or maintaining water service to a particular community.

***2** The plaintiff asserts that the General Assembly has not authorized the defendant to impose such surcharges, that the defendant does not have any legislative authority to impose these non-member surcharges on the plaintiff, and therefore, the surcharges are unlawful. Pursuant to General Statutes § 52–29, [2] the plaintiff seeks a declaratory judgment ruling that the defendant has acted unlawfully, exceeded its legislative authority and acted to the detriment of the plaintiff. On May

7, 2014, the Senate passed Special Act 14–21, amending the Charter to allow for surcharges.

On August 13, 2015, the plaintiff filed a motion for summary judgment (# 134) on the ground that the defendant, as a matter of law, exceeded its statutory authority by imposing a non-member surcharge on the plaintiff and cannot establish any of its special defenses. On December 11, 2015, the defendant filed a memorandum in opposition (# 148). That same day, the defendant filed its own motion for summary judgment (# 145) on the ground that there is no justiciable case or controversy between the parties. On February 2, 2016, the plaintiff filed a brief (# 150) in reply to the defendant's opposition and in opposition to the defendant's motion. The defendant filed a reply (# 154) on February 10, 2016. The parties submitted evidence in support of their own motions and in opposition to the motions against them, which will be discussed below as necessary. Oral argument was held on the motions on February 11, 2016.

I

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant's motion for summary judgment (# 145) is premised on the ground that the plaintiff's claim is moot and otherwise nonjusticiable. Because this motion implicates the court's subject matter jurisdiction, it is addressed first. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction ... Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable ... Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute ... (2) that the interests of the parties be adverse ... (3) that the matter in controversy be capable of being adjudicated by judicial power ... and (4) that the determination of the controversy will result in practical relief to the complainant ... A case is considered moot if [the trial] court cannot grant ... any practical relief through its disposition of the merits ..." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Valvo v. Freedom of Information Commission,* 294 Conn. 534, 540–41, 985 A.2d 1052 (2010).

[1] The defendant argues that there is no practical or effective relief being sought by the plaintiff, or which could otherwise be awarded, because members of the Glastonbury Town Council were unable to identify the plaintiff's objectives in seeking a declaratory judgment. (See Defendant's Exhibits D, M, N, O, P.) Additionally, the defendant argues that Special Act 14–21 clarified and affirmed the defendant's right to impose a non-member surcharge on the plaintiff, such that the defendant, by imposing such surcharges prior to that legislation, was acting within its statutory authority. In opposition, the plaintiff argues there is practical relief available to it, and that the statements of the Town Council members cannot be interpreted as an admission to the contrary.

***3** The defendant's argument concerning mootness arises from Special Act 14–21 which provides, in relevant part: "The Metropolitan District is authorized to supply water to any town or city that is not a member town or city of the district, any part of which is situated not more than twenty miles from the state capitol of Hartford, or to the inhabitants thereof, or to any state facility located within such area, upon such terms as may be agreed upon, but all other sources belonging to any such town or city shall be developed by the consumer or made available for development by said district. Except as otherwise agreed between the district and a customer, *the district shall supply water at water use rates and with customer service charges uniform with those charged within said district Any nonmember town surcharge imposed on any such customer or inhabitant shall not exceed the amount of the customer service charge.* The cost of constructing the pipe connection between the district and such town or city and the cost for capital improvements within such town or city shall be paid by such town or city or by the customers inhabiting such town or city. The cost of constructing the pipe connection between the district and any such state facility shall be paid by the State of Connecticut. Nothing herein shall authorize The Metropolitan District to supply any water in competition with any water system in any town or city, except by agreement." (Emphasis added.)

The defendant raised a similar argument claiming mootness in a motion to dismiss (# 109), which was rejected by the court in a memorandum of decision (# 114), filed on October 10, 2014. Despite the defendant's suggestion to the contrary, there is no basis for the court to revisit its previous ruling that Special Act 14–21 is not a clarifying amendment, and therefore, is not retroactive. As previously stated in the October 10, 2014 memorandum of decision, nothing in the 2014 amendment or its legislative history evidences a clear intent that the surcharge component be applied retroactively. "A statute should not be applied retroactively to pending actions unless

the legislature clearly expressed an intent that it should be so applied." *McNally v. Zoning Commission,* 225 Conn. 1, 9, 621 A.2d 279 (1993); *New Haven v. Public Utilities Commission,* 165 Conn. 687, 726, 345 A.2d 563 (1974). "It is a rule of construction that statutes are not to be applied retroactively to pending actions, unless the legislature clearly expresses an intent that they shall be so applied ... 'The passage or repeal of an act shall not affect any action then pending.' General Statutes § 1–1." (Citations omitted.) *New Haven v. Public Utilities Commission, supra,* 165 Conn. at 726, 345 A.2d 563.

[2] The defendant's remaining argument in support of its motion for summary judgment concerns a different matter of justiciability, namely, whether there is any practical or effective relief available to the plaintiff. Although this argument was also rejected by the court in its October 10, 2014 memorandum of decision, nonetheless, for the sake of completeness, the court further articulates as follows. "The test for determining mootness is not [w]hether the [respondent] would ultimately be granted relief ... The test, instead, is whether there is any practical relief this court can grant the appellant." (Internal quotation marks omitted.) *In re David L.,* 54 Conn.App. 185, 189, 733 A.2d 897 (1999). Thus, while practical relief may be difficult to articulate or implement, if there is any practical relief available, then the court may exercise jurisdiction. See *Pamela B. v. Ment,* 244 Conn. 296, 313, 709 A.2d 1089 (1998) (specter of difficulties in crafting 'practical relief' did not bar court's assumption of jurisdiction).

***4** The plaintiff is seeking a declaration by the court that certain surcharges imposed by the defendant were unlawful. The plaintiff is not presently seeking damages and is not obligated to do so. See General Statutes § 52–29(a); see also *England v. Coventry,* 183 Conn. 362, 364, 439 A.2d 372 (1981) (Superior Court has subject matter jurisdiction over suits for declaratory relief despite the adequacy of other legal remedies). There is no question that if the surcharges are unlawful, then the plaintiff can demonstrate damages for those years the surcharges were imposed. It may be that the plaintiff has not articulated the specific legal theory under which it would recover those damages, and it is uncertain whether the plaintiff will seek to recover those damages at all. (See Def.'s Ex. D, M, N, O, P.) This does not mean, however, that as a matter of law, there is no practical relief available to the plaintiff. See, e.g., *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 8–9, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) ("Although we express no opinion as to the validity of respondents' claim for damages, that claim is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed." [Footnote omitted.]) Rather, allegations of ascertainable damages in the form of a wrongfully imposed surcharge indicate that practical relief may be available. Finally, as this court has previously quoted in its October 10, 2014 memorandum of decision, "a plaintiff who wins a declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment. This further relief may include damages which had accrued at the time the declaratory relief was sought." *Lighthouse Landings, Inc. v. Connecticut Light & Power Co.,* 300 Conn. 325, 361, 15 A.3d 601 (2011) (Palmer, J., dissenting) (quoting 1 Restatement (Second) of Judgments § 33, comment (c) (1982)). Accordingly, the court finds that the plaintiff's action for declaratory relief is justiciable. Thus, the defendant's motion for summary judgment must be denied.

II

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff's motion for summary judgment (# 134), asks the court to determine, as a matter of law, that the surcharges imposed by the defendant from 2011 to 2014 were unlawful. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ... In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Citation omitted; internal quotation marks omitted.) *Vendrella v. Astriab Family Ltd. Partnership,* 311 Conn. 301, 313, 87 A.3d 546 (2014). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact ... When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing

the existence of such an issue." (Internal quotation marks omitted.) *Romprey v. Safeco Ins. Co. of America,* 310 Conn. 304, 319–20, 77 A.3d 726 (2013).

***5 [3]** The plaintiff argues that at the time the defendant imposed the surcharges, the General Assembly had not authorized the defendant to recover general or capital costs arising from maintenance of and improvements to the defendant's properties, facilities, and water supply infrastructure. Thus, the surcharges from 2011 to 2014 were unlawful. In its opposition, the defendant argues that it always possessed the authority to impose the surcharge.

The defendant "is a political subdivision of the state, specially chartered by the Connecticut General Assembly for the purpose of water supply, waste management and regional planning." *Martel v. Metropolitan District Commission,* 275 Conn. 38, 41, 881 A.2d 194 (2005). "It is settled law that as a creation of the state, a municipality has no inherent powers of its own ... A municipality has only those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes ... This principle applies with equal force to quasi-municipal corporations." (Citations omitted; internal quotation marks omitted.) *Wright v. Woodridge Lake Sewer District,* 218 Conn. 144, 148, 588 A.2d 176 (1991). In order to determine what powers were granted to the defendant by the state, it is appropriate to examine the legislation that undergirded the defendant's claimed authority.

Prior to the passage of Special Act 14–21, the General Assembly provided the defendant with the following powers: "The Metropolitan District is authorized to supply water, at rates uniform with those charged within said district, to any town or city, any part of which is situated not more than twenty miles from the state capitol of Hartford, or to the inhabitants thereof, or to any state facility located within such area, upon such terms as may be agreed upon, but all other sources belonging to any such town or city shall be developed by the consumer or made available for development by said district. The cost of constructing the pipe connection between the district and such town or city shall be paid by such town or city. The cost of constructing the pipe connection between the district and any such state facility shall be paid by the State of Connecticut. Nothing herein shall authorize The Metropolitan District to supply any water in competition with any water system in any town or city, except by agreement." Special Act 77–62.

Under certain circumstances the defendant was additionally empowered to assess additional costs pursuant to Special Act 49–272, which provided: "The Metropolitan District is authorized to assess the cost of laying water mains in streets or highways and the cost of laying or replacing water service pipes upon public or private property upon the land and buildings benefitted thereby in any town which is not a member of said district, but in which it shall have the right either under the terms of its charter or otherwise to supply or distribute water, and to secure payment thereof by lien. Such assessment and lien rights may be exercised by the water bureau of said district under procedure substantially similar to that for like assessments made upon property located within the territorial limits of said district."

***6** Thus, the defendant's authorization to impose fees on the plaintiff was limited to the following: (1) a charge for supplying water; (2) a charge for constructing the pipe connection between the district and the municipality; and (3) a charge for laying water mains and for laying or replacing water service pipes upon the land and buildings benefitted thereby. Nevertheless, beginning in 2011, the plaintiff saw a marked increase in amount of the surcharge. In a February 15, 2013 letter from Scott Jellison, deputy CEO of the defendant, the complained-of increase was explained as reflecting the "fixed costs associated with producing drinking water," such as "watershed lands" and "treatment plants." [3] (Jellison letter, Plaintiff's Exhibit A.) The evidence indicates that at least as of the time of the increase, the surcharge was not confined to the cost of laying and repairing water service pipes and water mains to benefit particular customers. Rather, it encompassed the defendant's costs in maintaining the entire water utility infrastructure, spread among all of its customers in non-member towns.

Moreover, the General Assembly authorized the defendant to recover costs associated with the construction and maintenance of water pipes only from those customers whose property was directly benefitted from those pipes. Because the General Assembly did not authorize the defendant to recover its water utility infrastructure or capital improvement costs, the surcharge included costs that the defendant was not authorized to impose upon the plaintiff, and therefore, it was illegal as a matter of law.

In light of the determination that the surcharge was illegal as a matter of law, the defendant is left to rely on its special defenses. As a bar to judgment, the defendant raises the defense of laches. [4] "A conclusion that a plaintiff has

been guilty of laches is one of fact for the trier and not one that can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law ... The defense of laches, if proven, bars a plaintiff from seeking equitable relief ... First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant ... The mere lapse of time does not constitute laches ... unless it results in prejudice to the [opposing party] ... as where, for example, the [opposing party] is led to change his position with respect to the matter in question." (Citations omitted; internal quotation marks omitted.) *Caminis v. Troy,* 112 Conn.App. 546, 552, 963 A.2d 701 (2009), aff'd, 300 Conn. 297, 12 A.3d 984 (2011).

In support of the defense of laches, the defendant notes that the complained-of surcharge on non-member towns goes back to 1942. The defendant argues that the passage of almost seventy years between the first surcharge and the plaintiff's first objection in 2011 constitutes an unreasonable delay that has prejudiced the defendant. The plaintiff counters that its claim is limited to a declaration regarding the surcharges from 2011 to 2014, and does not concern the surcharges prior to 2011. Consequently, the defendant is not prejudiced by being asked to address such recent concerns. Finally, the plaintiff contends that its delay in complaining about the surcharge was not unreasonable because the surcharges before 2011 were for only nominal amounts, and the surcharges thereafter reflect substantial increases, which prompted the plaintiff to investigate the nature of the surcharge.

***7** The defendant has submitted evidence indicating that the plaintiff became a non-member town in 1941, and that the non-member town surcharge was first imposed in 1942. (Zinzarella Affidavit, Def.'s Ex. B, ¶ 4.) The surcharge was increased in the years 1949 and 1955, and then annually between 2006 and 2014. In the period from 2006 to 2014, the amount of the quarterly surcharges wavered between $10 and $13. The quarterly surcharge increased from $13.17 in 2011 to $39.54 in 2012. It jumped to $105.75 in 2013 before decreasing to $49.74 in 2014. (*Id.,* at ¶ 6, 12 A.3d 984.) The plaintiff did not complain about the surcharge until 2012. (*Id.*) The defendant maintains that the surcharge provided stability and the foundation to equitably distribute the cost of maintenance and improvements to the system, and that it is prejudiced by the plaintiffs untimely pursuit of this claim. According to the defendant, had the plaintiff made a complaint earlier, the defendant could have addressed it by making changes to the way customers were charged for water. (*Id.*)

[4] Upon review of the evidence submitted by the defendant in support of its special defense of laches, the court finds, under all the circumstances, it was not unreasonable for the plaintiff to have delayed challenging the surcharge until 2014. For most of the time that the surcharge was in place, it was for a small amount. After remaining relatively stable for many years, it increased by nearly 300% in 2012 and nearly 800% in 2013. It was the sharp increase that prompted the plaintiff to complain about the surcharge and to investigate its origins. Upon concluding that there was no legal basis for the surcharge, the plaintiff swiftly set to challenge the defendant's interpretation of its assessment authority under the Charter. Communications thereafter indicated that the recent increase in the surcharge included costs that were not within the defendant's power to impose. (Jellison letter, Pl.'s Ex. A.) Additionally, other than its argument that an earlier complaint may have led to earlier action, the defendant has failed to demonstrate how it was led to change its position with respect to the imposition of the surcharge, as is necessary for a showing of prejudice. Therefore, based on the subordinate facts, the evidence presented by the defendant does not support a special defense of laches. Therefore, the special defense of laches does not bar the plaintiff's motion for summary judgment.

CONCLUSION

The General Assembly did not provide the defendant with any express authority to impose a non-member town surcharge until the enactment of Special Act 14–21, which amended the defendant's governing legislation. As discussed at length in the court's earlier decision denying the defendant's motion to dismiss, Special Act 14–21 does not apply retroactively so as to sanction the defendant's imposition of the non-member town surcharge. Likewise, as noted elsewhere in the present memorandum of decision, Special Act 14–21 is not a confirmation or clarification of any implicit authority that the defendant already possessed. The defendant has otherwise failed to offer an interpretation of the governing legislation that supports its contention that it possessed the authority to impose the surcharge. Upon review of the grants of authority made to the defendant, the court is compelled to conclude that the surcharge, which encompassed general costs that the defendant was not expressly empowered to impose upon the plaintiff, was unlawful.

***8** For all the foregoing reasons, the court finds that (1) the plaintiff's action for declaratory relief is justiciable; (2) the surcharge imposed by the defendant on the plaintiff was illegal; and (3) none of the claimed special defenses serve to bar judgment. Accordingly, the defendant's motion for summary judgment (# 145), is hereby denied and the plaintiff's motion for summary judgment (# 134), is hereby granted.

All Citations

Not Reported in A.3d, 2016 WL 3179757, 62 Conn. L. Rptr. 394

Footnotes

1 Member towns are Bloomfield, East Hartford, Hartford, Newington, Rocky Hill, West Hartford, Wethersfield and Windsor.

2 General Statutes § 52–29(a) provides: “The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment.”

3 The relevant portions of the letter provided as follows: “Generally, water bills for customers in our member and non-member towns are the same with the exception of the Non–Member Town (NMT) charge. Per MDC ordinances, non-member town customers may also pay a Special Capital Improvement Surcharge to reimburse the MDC for the cost of capital improvements necessary to provide or maintain water service to their specific community. These charges are applied, in whole or in part, to fairly distribute and offset operational, maintenance and infrastructure improvement costs which cannot be passed on to our member towns.

“As a nonprofit municipal corporation, the MDC bases its water rates and projected revenue on anticipated consumption for the year in order to recover costs to produce drinking water. However, the fixed cost to maintain the water utility infrastructure, such as watershed lands, treatment plants, and pipes, typically increases annually, as we are subject to the same increases in price that consumers experience for electricity, fuel, natural gas, chemicals and other commodities. As with most water utilities across the country, declining water consumption makes it impossible to predict revenue for budgeting purposes to recover annual operating cost. Due to this decline, and upon recommendation of our rating agencies, the fixed costs associated with producing drinking water were shifted to the Water Customer Service Charge and NMT charges. These charges provide a more stable source of revenue than the Water consumption Charge and are not subject to the same environmental and economic facts that affect consumption.” (Plaintiff's Exhibit A.)

4 The two other special defenses asserted by the defendant are either not viable or contingent on the defense of laches. The defendant's third special defense, that the plaintiff lacks standing to bring an action on behalf the defendant's other customers, concerns an issue of subject matter jurisdiction. The plaintiff argues that it is not acting on behalf of the defendant's other customers, and concedes that the court may limit the granting of declaratory relief to the plaintiff. This court has already determined that the plaintiff has standing to bring this action in its own name. Therefore, the third special defense does not bar summary judgment in favor of the plaintiff.

The fourth special defense of equitable jurisdiction is derivative of the laches defense such that it rises and falls with the validity or invalidity of the laches defense.